



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 20 2008

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Kathleen E. Foley, Esq.
Orrick, Herrington & Sutcliffe LLP
Columbia Center
1152 15th Street, NW
Washington, DC 20005**

**RE: MUR 6093
Transurban Group
Transurban (USA) Inc.**

Dear Mr. Burton and Ms. Foley:

On June 10, 2008 and July 7, 2008, you notified the Federal Election Commission of the possibility of violations by your clients, Transurban Group and its subsidiary Transurban (USA) Inc., of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act").

After reviewing the information contained in your submission and its supplement, the Commission, on October 9, 2008, found reason to believe that your clients violated 2 U.S.C. § 441e, a provision of the Act. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

If your clients are interested in engaging in pre-probable cause conciliation, please contact Phillip Olaya, the attorney assigned to this matter, at (202) 694-1571 or (800) 424-9530, within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. See 2 U.S.C.

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§ 437g(a), 11 C.F.R. Part 111 (Subpart A). Similarly, if your clients are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,



Donald F. McGahn II
Chairman

Enclosures
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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7 **RESPONDENTS:** Transurban Group
8 Transurban (USA) Inc.

MUR 6093

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11 **I. FACTUAL BACKGROUND**

12 Transurban Group ("the Group"), an Australian-based international toll road developer
13 and manager, began U.S. operations in April 2005 from offices in New York, New York. The
14 Group established three domestic subsidiaries: Transurban (USA) Operations Inc.; Transurban
15 (USA) Holdings Inc.; and Transurban (USA) Inc. ("Transurban USA"). Although the Group
16 began to generate income from its domestic operations in late 2006, the foreign parent company
17 remained its predominant source of funds through 2007.

18 Respondents hired a government relations firm, The Vectre Corporation ("Vectre"), to
19 support its activities in Virginia. Vectre reportedly advised Respondents that the incorporated
20 U.S. subsidiaries of foreign corporations could make political contributions to state candidates
21 and state political committees in Virginia. Between September 26, 2005 and February 1, 2008,
22 Transurban USA made \$174,000 in nonfederal contributions which are listed in the *sua sponte*
23 submission.

24 In October 2006, a Transurban Group manager raised a question as to the legality of
25 making nonfederal contributions. In a November 2006 email, Vectre's president advised, "In
26 Virginia, corporate contributions are allowed under Virginia law for state elections . . . There is
27 no limit in terms of the amount of contributions." Later that month, he further advised that
28 Virginia did not require corporations to report political contributions, but added a disclaimer that

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1 **"Vectre is not a law firm and does not provide legal services." Based on the information that**
2 **Vectre provided, the Board approved a report that advocated continuing its political**
3 **contributions policy. See Attachments to Sua Sponte Submission.**

4 **On February 6, 2008, as part of an ethics briefing from an outside law firm on unrelated**
5 **federal matters, Transurban USA learned that it could not use funds received from a foreign**
6 **parent corporation to make contributions or donations in connection with a Federal, State, or**
7 **local election. Transurban USA promptly contacted the Group's general counsel in Australia,**
8 **who had joined the company in September 2006 and was unaware of its practice of making such**
9 **contributions. On February 7, 2008, Transurban Group began an internal investigation through**
10 **Caplin & Drysdale, Chtd., who interviewed officers, employees, and the Board chairman of the**
11 **Group and Transurban USA. Caplin & Drysdale also employed a computer forensics firm to**
12 **identify and preserve potentially relevant computer records. The investigation concluded that**
13 **Transurban USA and Transurban Group had made foreign national contributions but had done so**
14 **in mistaken reliance on the advice received from Vectre.**

15 **On July 7, 2008, Respondents provided a supplemental submission to inform the**
16 **Commission that it discovered an additional \$7,000 in contributions, and to detail the remedial**
17 **actions it had taken to inform the recipients that the contributions violated federal campaign**
18 **finance laws and to request refunds of all prohibited contributions. Respondents further stated**
19 **that it planned to implement internal controls and processes that would include training on when**
20 **to seek appropriate legal advice.**

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II. ANALYSIS

At issue is whether Respondents violated 2 U.S.C. § 441e when the U.S. subsidiary made nonfederal contributions to candidates and political committees in Virginia with funds provided by the foreign parent corporation. It is unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value in connection with a Federal, State, or local election, or to a committee of a political party. 2 U.S.C. § 441e(a)(1)(A), (B); 11 C.F.R. § 110.20(b). Additionally, a foreign national may not directly or indirectly make an expenditure, an independent expenditure, or a disbursement in connection with a Federal, State, or local election. 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(f). Likewise, Commission regulations prohibit foreign nationals from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of any person, such as a corporation, with regard to such person's Federal or nonfederal election-related activities, including decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office. 11 C.F.R. § 110.20(i).

A "foreign national" is an individual who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence. 2 U.S.C. § 441e(b)(2). The term likewise encompasses "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 2 U.S.C. § 441e(b)(1) (citing 22 U.S.C. § 611(b)(3)).

In determining whether a U.S. subsidiary of a foreign national corporation is permitted to make contributions to state and local committees, the Commission, in past Advisory Opinions, has looked at two factors. First, the Commission assesses whether the subsidiary is predominantly funded by the foreign national such that a contribution by the subsidiary is

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1 essentially a contribution from the foreign national. Second, the Commission considers the
2 status of the decision-makers involved. In Advisory Opinion 1989-20 (Kuilima), a U.S.
3 subsidiary of a Japanese company wanted to establish a PAC. However, the subsidiary did not
4 yet generate income from its projects and obtained "almost all of its funding from loans and
5 contributions" from the foreign parent company. *Id.* at 1. The AO concluded that the U.S.
6 subsidiary could not establish the PAC because it derived a predominant source of funds from
7 the foreign parent company. *Id.* at 2. As to the second factor, the AO stated that "no director or
8 officer of the company or its parent who is a foreign national may participate in any way in the
9 decision-making process with regard to making the proposed contributions." *Id.* at 3. But see
10 Advisory Opinion 1985-03 (Diridon) (allowing a committee to receive a contribution from a
11 U.S. subsidiary whose financial involvement in the U.S. was "substantial").

12 In the present matter, Respondents acknowledge the nonfederal contributions to
13 candidates for state office and to state political committees violate 2 U.S.C. § 441e. Indeed,
14 based on the information in the *sua sponte* submission, Transurban USA's activities appear to
15 violate 2 U.S.C. § 441e because it used funds derived predominantly from its foreign parent
16 company to make contributions to nonfederal candidates and political committees. Like the
17 domestic subsidiary in AO 1989-20, Transurban USA had not yet generated enough domestic
18 income so that its nonfederal contributions to state and local committees could be considered
19 separate from the foreign parent. Moreover, Transurban Group violated Commission regulations
20 because its Board of Directors directly participated in determining whether to continue the
21 political contributions policy of its U.S. subsidiaries. 11 C.F.R. § 110.20(i).

22 The Group, however, asserts that its violations stem from the erroneous advice that
23 Vectre provided. As the submission notes, Transurban USA originally made political

1 contributions on an ad hoc basis based on Vectre's recommendations, and continued to rely on
2 Vectre's supposed expertise to make additional contributions over the next several years. The
3 Group further asserts that none of the employees involved in the violation were aware they had
4 violated federal campaign finance laws. Indeed, Vectre had advised the Group that their
5 activities were entirely legal.

6 As outlined in the submission, Respondents have since taken corrective action that
7 included an immediate end to its political activity following discovery of its violations. Further,
8 in a supplement to the submission dated July 7, 2008, Respondents have sought full refunds from
9 the recipients of its contributions. Respondents also noted that they would implement training to
10 help employees identify when legal counsel is needed.

11 Accordingly, because 2 U.S.C. § 441e prohibits a foreign national, directly or indirectly,
12 from making a contribution or donation of money or other thing of value, or making an
13 expenditure in connection with a Federal, State, or local election, the Commission finds reason to
14 believe that The Transurban Group and Transurban USA Inc. violated 2 U.S.C. § 441e.

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